

This is a claim for a September 29, 1994, accident. In the February 23, 2009, Award, Judge Klein adopted the functional impairment opinion of the treating physician,

Dr. James L. Gluck,¹ and awarded claimant permanent disability benefits for a 47 percent functional impairment to his left hand.

Claimant contends he is entitled to receive benefits for a permanent total disability. Accordingly, claimant requests the Board to modify the Award.

Respondent contends claimant is entitled, at most, to a 47 percent functional impairment to the left hand.

The nature and extent of claimant's injuries and disability is the primary issue before the Board on this appeal. But claimant also raises the issue of whether the July 6, 2007, psychological evaluation report of T. A. Moeller, Ph.D., and drug test results should be included in the record.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes the February 23, 2009, Award should be affirmed except as modified below.

Claimant, who is 58 years old and left-handed, lost both his left index and left middle fingers at work on September 29, 1994, in an accident while using a radial saw. Claimant described the accident, as follows:

I was cutting an order for [respondent]. And I was cutting on a 2-by-12, which was -- should have been on the cutting table. So I was cutting 11-inch block. And I was using my left hand and I was pulling radial saw with my right hand. And the block caught in the groove and flipped up and saw run on top of my hand. And I lost two fingers and cut my thumb half off.²

In addition to losing both his index and middle fingers, claimant alleges he also injured his ring and small fingers, wrist, shoulder, elbow, and neck.³ Claimant believes he injured his neck by slamming his head on the concrete floor when he fell to the floor after the saw had severed his fingers. Likewise, he believes that fall is at least partially responsible for left

¹ In the Award, Judge Klein mistakenly identified Dr. Gluck as the court's neutral examiner.

² Garrett Depo. at 4, 5.

³ *Id.*, at 5.

elbow and shoulder injuries. He also believes he developed hypertension due to the stress of losing his fingers.

In addition, claimant alleges the accident has created some psychological problems for him such as post-traumatic stress, depression, bipolar disorder, and short-term memory loss.⁴

Claimant was taken by ambulance to a local hospital emergency room. He was admitted to the hospital for treatment and contends he complained that his shoulder, elbow, and head were hurting. While in the hospital, Dr. James L. Gluck, who is a board-certified orthopedic surgeon, operated on claimant's left hand.

After being released from the hospital, claimant continued to receive treatment from Dr. Gluck. Although claimant alleges he spoke with his physical therapist regarding symptoms in his neck, left shoulder, left elbow, and left wrist, he acknowledges that he did not mention them to Dr. Gluck.⁵ Moreover, claimant testified that by early 1995 he was no longer experiencing problems with his neck and left shoulder.⁶

Dr. Gluck released claimant from medical treatment on March 8, 1995. At that time the doctor suggested that claimant undergo a psychological evaluation because claimant had sustained a disfiguring injury, which could significantly affect his self-image.⁷ In addition, the doctor recommended a cosmetic prosthesis.

Claimant testified that he then spoke with his supervisor about returning to work and was told he had been terminated due to a positive drug test. From mid-May 1995 through mid-February 1999, claimant was incarcerated. While in prison, claimant worked breaking rock and moving dirt with a wheelbarrow, worked in the sewing shop running a sewing machine, and worked in the prison laundry. Since leaving prison claimant has neither worked nor looked for work. He now receives Social Security Supplemental Security Income (SSI) benefits, which claimant indicated were granted because of a tumor removed from his left side while in prison, a left foot injury from the 1970s, and his hand injury he sustained at work.

⁴ *Id.*, at 16.

⁵ *Id.*, at 11.

⁶ *Id.*

⁷ Gluck Depo. at 23.

Claimant admitted he had two convictions for cocaine possession and one conviction for sale of marijuana. Nonetheless, claimant denies ever using marijuana and he does not recall ever using cocaine.⁸

Claimant testified he believed he completed the 12th grade and graduated from high school but he never received a high school diploma. He also testified he completed three or four semesters of college at Langston University in Oklahoma, but the university was unable to produce a copy of his records as he was told there had been a break-in and his records were stolen. But in August 2008 rehabilitation consultant Karen Crist Terrill met with claimant and she reported that claimant had only completed the 11th grade and did not have a GED.

Nature and extent of injuries and disability

Dr. Gluck determined claimant had reached maximum medical improvement in March 1995 and rated him as having a 47 percent impairment to the left hand as measured by the *AMA Guides*.⁹ There was no significant change in claimant's condition in September 1999, when the doctor next saw claimant. But at that time claimant complained of left elbow symptoms. Dr. Gluck next saw claimant in March 2000 and then in October 2007. At the latter visit, claimant complained of left shoulder and neck pain. The doctor does not believe the elbow symptoms were related to the September 1994 accident.¹⁰ Similarly, the doctor did not see how a saw injury to a hand would result in neck and shoulder problems.¹¹ According to Dr. Gluck, claimant never complained to him of neck and shoulder symptoms until October 2007.

When Dr. Gluck released claimant in March 1995, the doctor recommended the following restrictions:

1. Limited fine motor activity with his left hand, especially in a quickly paced environment. Because of the loss of the fingers, he is going to have difficulty picking up small objects.
2. Limited grasping activities with the left hand and no grasping more than 15-20 pounds.

⁸ Garrett Depo. at 58, 59.

⁹ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

¹⁰ Gluck Depo. at 11.

¹¹ *Id.*, at 15.

3. No lifting or carrying more than 15-20 pounds on an occasional and 10 pounds on a frequent basis with the left hand.
4. Limited exposure to cold environment if there are problems with cold intolerance.
5. Care must be taken if he is to operate any dangerous equipment because of the decrease in sensation. This would include such things as drills, saws, and exposed motors.¹²

At Judge Klein's request, Dr. Pat D. Do evaluated claimant. When claimant was examined by Dr. Do in June 2007, claimant told the doctor he had experienced neck and shoulder pain since the September 1994 accident and that the pain had become intolerable in the preceding two years. The doctor concluded claimant's neck pain and left shoulder impingement were not a direct result of the September 1994 accident. Instead, even assuming there had been no intervening injury to claimant's neck, the doctor opined within a reasonable degree of medical probability that claimant's neck and shoulder symptoms were more likely due to the natural aging process.¹³ Also, Dr. Do was unable to relate claimant's hypertension to his September 1994 accident.¹⁴

Claimant's medical expert witness, Dr. Pedro A. Murati, examined claimant in March 2007 and then again in late November 2007. Dr. Murati provides a much more detailed history of claimant's medical treatment than can be ascertained from either Dr. Gluck's or Dr. Do's records or testimony. Based upon his review of claimant's medical history and his examinations of claimant, Dr. Murati diagnosed (1) status post-amputation of the left second and third digits, (2) left shoulder rotator cuff strain or tear, and (3) myofascial pain syndrome affecting the left shoulder girdle and extending into the cervical paraspinals. Moreover, the doctor recommended that claimant refrain from using any tools such as a hammer with his left hand, heavy grasping with his left hand, using ladders, crawling, working above shoulder level with the left hand, reaching more than 24 inches with the left arm, and placing his neck in awkward positions.¹⁵

Dr. Murati also opined that claimant's diagnoses were related to his September 1994 accident. The doctor testified, in part:

Q. Can you describe for the court how you believe from your review of the medical records, history, physical examination and so forth with respect to Mr. Garrett that

¹² *Id.*, Ex. 2.

¹³ Do Depo. at 17, 18.

¹⁴ *Id.*, at 20.

¹⁵ Murati Depo. at 24, 25.

you believe Mr. Garrett suffered a shoulder and neck injury that is permanent in nature or quality as a result of the event of September 29, 1994?

A. Well, I believe that his shoulder and neck complaints started the day of the accident. I believe that when you suffer an amputation of the hand, a natural response of the body is to pull the hand away quickly. I think that is when it started.¹⁶

Dr. Murati acknowledged claimant's shoulder and neck complaints did not appear in claimant's past medical records until years after the September 1994 accident. Moreover, the doctor admitted he did not speak with claimant about the work claimant performed while in prison.¹⁷

Using the *Guides*, Dr. Murati determined claimant had sustained a 45 percent impairment to the left hand (or a 41 percent impairment to the left upper extremity). Combining with that percentage for the loss of grip strength and severe glenohumeral crepitus, the doctor found claimant had a 66 percent impairment to the left upper extremity (or 40 percent whole person impairment). And combining with that a 5 percent whole person impairment for myofascial pain syndrome affecting the cervical paraspinals, Dr. Murati concluded claimant sustained a 43 percent whole person impairment.¹⁸

In his March 14, 2007, medical report Dr. Murati recommended psychological evaluation for claimant. In June 2007, claimant saw Dr. T. A. Moeller, a licensed psychologist. Claimant objected to the admission of Dr. Moeller's July 6, 2007, report. But as the evaluation was requested by Judge Klein, the evaluation report is part of the record under K.S.A. 44-516, which provides:

In case of a dispute as to the injury, the director, in the director's discretion, or upon request of either party, may employ one or more neutral health care providers, not exceeding three in number, who shall be of good standing and ability. The health care providers shall make such examinations of the injured employee as the director may direct. The report of any such health care provider shall be considered by the administrative law judge in making the final determination.

Dr. Moeller's report concluded with the following opinions, all within a reasonable degree of psychological probability; namely, (1) the most appropriate Axis I diagnoses are Malingering and to some degree Pain Disorder Associated with Psychological Factors and

¹⁶ *Id.*, at 25.

¹⁷ *Id.*, at 33.

¹⁸ *Id.*, at 27, 28.

General Medical Condition, (2) claimant's tendency toward conscious overstatement (or malingering) precludes any objective assessment of his pain problem, (3) due to malingering, it is not possible to determine if claimant's alleged psychological difficulties were either exacerbated or caused by the September 1994 accident, (4) the significant amount of time that has passed has diminished the effective outcome of any psychologically based pain control therapy, and (5) claimant should continue his mental health care and comply with recommendations for medications, but the symptoms being treated have not been caused or exacerbated by the September 1994 injury.

Judge Klein was persuaded by Dr. Gluck's opinion regarding the extent of claimant's impairment. Accordingly, the Judge found claimant sustained a 47 percent impairment to his left hand as a result of the September 1994 accident. The Judge did not grant claimant benefits for his neck or shoulder complaints, hypertension, memory problems, or other psychological issues. The Board agrees with Judge Klein's analysis of the evidence. The Board finds the evidence fails to establish that claimant is entitled to benefits for other than his left hand as too much time elapsed between the September 1994 accident and the manifestation of those symptoms. Indeed, claimant testified that by late 1994 and early 1995 his shoulder and neck symptoms had resolved. He then returned to prison where he broke rocks and shoveled dirt. Moreover, the Board does not find claimant's memory especially keen or his credibility untarnished.

Considering Dr. Gluck's work restrictions, respondent's rehabilitation consultant, Karen Crist Terrill, testified claimant could work as either a forklift driver or a telemarketer (both of which he previously performed) and in the Wichita, Kansas, labor market earn \$370 or \$307 per week, respectively.¹⁹ Ms. Terrill also testified claimant could work as a laborer as long as the job required gross movement rather than fine dexterity with the left hand.

Claimant's labor market expert, Jerry D. Hardin, met with claimant in May 2008. Mr. Hardin testified there were a few jobs that claimant could still perform in the open labor market but those jobs would be very limited and probably only pay minimum wage²⁰ or around \$300 per week.²¹ Mr. Hardin reasoned:

One, because he's left-handed and the injury was to the left fingers and arm and shoulder. And so it is his dominant hand that was affected. Two, he has a limited amount of education. Eleventh grade and no GED, no other formal education other

¹⁹ Terrill Depo. at 11, 12.

²⁰ Hardin Depo. at 15.

²¹ *Id.*, at 16.

than a vo-tech where he spent six months learning how to do upholstery while he was away. [Claimant] has a history of being incarcerated. And so that's going to eliminate a lot of jobs from him. And he just has so many things against him that with these restrictions and limitations there is going to be a limited number of jobs that he can still be hired in and perform the work and be paid for. But there would be some.²²

For example, Mr. Hardin believes claimant can still drive a truck and operate a backhoe,²³ take food orders and serve food,²⁴ perform janitorial work,²⁵ perform lawn work,²⁶ work as a bill collector,²⁷ and operate a forklift.²⁸

Claimant requests permanent total disability benefits under K.S.A. 44-510c, which provides:

(a)(2) Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis, or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

In *Wardlow*,²⁹ the Kansas Court of Appeals held that being *essentially and realistically unemployable* was the equivalent of being permanently and totally disabled.

The Board finds the evidence fails to establish that claimant is permanently and totally disabled due to the injuries he received in September 1994. Instead, the greater

²² *Id.*, at 15, 16.

²³ *Id.*, at 28, 29.

²⁴ *Id.*, at 30.

²⁵ *Id.*, at 31.

²⁶ *Id.*

²⁷ *Id.*, at 35, 36.

²⁸ *Id.*, at 36.

²⁹ *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 872 P.2d 299 (1993).

weight of the evidence establishes that claimant retains the ability to perform substantial and gainful employment in the open labor market. Consequently, claimant is not entitled to receive permanent total disability benefits.

In conclusion, the Board affirms the award of permanent disability benefits for a 47 percent impairment to the left hand. The February 23, 2009, Award should be modified, however, as set forth below regarding the order approving attorney fees.

Because of the above rulings, the issue surrounding the admissibility of the results of drug testing is rendered moot.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.³⁰ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board affirms the award of permanent disability benefits for a 47 percent impairment to the left hand but modifies the February 23, 2009, Award entered by Judge Klein as set forth below regarding the order approving attorney fees.

The Judge approved a contract for attorney fees. The record, however, does not contain a contract between claimant and Mr. Riedmiller, but it does contain claimant's contract with his former attorney, Dennis L. Phelps. Mr. Phelps has filed a lien, which was not addressed in the Award. Accordingly, the order approving attorney fees is set aside. Upon filing of the contract between claimant and Mr. Riedmiller, the Judge is directed to consider the issues of attorney fees and Mr. Phelps' lien.

The remainder of the February 23, 2009, Award is affirmed.

IT IS SO ORDERED.

³⁰ K.S.A. 2008 Supp. 44-555c(k).

Dated this ____ day of August, 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Roger A. Riedmiller, Attorney for Claimant
 Dennis L. Phelps, Former Attorney for Claimant
 D. Steven Marsh, Attorney for Respondent and its Insurance Carrier
 Thomas Klein, Administrative Law Judge